

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26**

AUSTIN BRIDGE & ROAD, LP¹

Employer

and

Case No. 26-RC-8501

**THE ARKANSAS REGIONAL COUNCIL
OF CARPENTERS, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS
OF AMERICA, LOCAL 690²**

Petitioner

REGIONAL DIRECTOR'S DECISION AND ORDER

The Employer, Austin Bridge & Road, LP, a Delaware limited partnership, has an office and place of business in Lake Village, Arkansas and is engaged in the construction of roads and bridges. The Petitioner, the Arkansas Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, Local 690, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, seeking to represent construction workers employed by the Employer on its Highway 82 Project in Arkansas.³ Following a hearing before a hearing

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ At the hearing, the Petitioner clarified its position that an appropriate unit would include all construction employees, including operators, laborers, carpenters, concrete finishers, and foremen, and would exclude all office clerical employees, professional employees, guards and supervisors as defined in the Act. The Employer agrees that the scope of the unit should include all constructions workers but argues the unit sought by the Petitioner does not include all the classifications of employees that would constitute an appropriate unit. The parties also stipulated that the following individuals were statutory supervisors: Tim Bruce, project manager; Walter Lawler, project superintendent; Sonya Cole, field office manager; and Terry Boykin, project engineer/surveyor.

officer of the National Labor Relations Board, the Petitioner and Employer both filed timely briefs with me. As stated at the hearing and in the briefs, this case presents the single issue of whether the present complement of 14 employees is a substantial and representative complement of the total anticipated work force, which is expected to increase to approximately 60 to 70 employees around December 2006. The Employer contends the petition is premature and should be dismissed because its current work force is not a substantial and representative complement of its projected work force. In contrast, the Petitioner submits that the petition should not be dismissed as untimely because the Employer's witness was not the day-to-day manager of the job site and he did not testify with sufficient certainty about the number of employees who would work on the job.

I have considered the evidence adduced during the hearing and the arguments advanced by the parties and, as explained below, I find that the petition is untimely because the appropriate unit is expanding and the Employer has not hired a substantial and representative complement of its projected work force.

I. FACTS

Pursuant to a contract with the Mississippi Department of Transportation, the Employer is constructing the Arkansas approach from U.S. Highway 82 to a new bridge across the Mississippi River into Mississippi. More specifically, the work consists of an abutment and 34 piers covering about eight-tenths of a mile. The Employer's work, valued at almost \$66 million, commenced on March 10, 2006 and is scheduled to be

completed November 30, 2008.⁴ The project is being overseen by the Employer's Southeast Regional Manager, Tony Stehling, who testified at the hearing. The day-to-day operations at the site are supervised by Project Manager Tim Bruce. Stehling testified that as regional manager he is responsible for soliciting work and then overseeing the construction from start to finish. He testified that generally he is on this job for some period of time each week and that he is in contact with the project manager on a daily basis.

Currently, the Employer is doing some preliminary work for the project. That includes building a detour for the traffic from Highway 82 and preparing to build the approach from Highway 82 to the first bridge pilings. The Employer has already completed renovating a building for its offices and creating a "haul road" for supplies and equipment that runs from Highway 82 over the levee and all the way to the river. At the hearing, the Employer's regional manager estimated that the Employer had completed approximately 3 to 4 percent of its project.

The Employer's present employee complement consists of 14 employees. Included in this complement are six carpenters, four laborers, one welder, and three operators. The operators consist of one dirt operator and two crane operators. Within two weeks of the hearing, the Employer planned to hire a fourth operator, for the concrete finishing machine, as work begins on the bridge substructure.

The first phase of work on the approach or the structure itself is the installation of two types of foundations. From pier 11 back to the abutment at the west end of the job,

⁴ For each day the project goes beyond the scheduled completion date, the Employer is subject to a penalty of approximately \$6000.

the foundation will consist of precast concrete piles. From pier 12 across the levee to pier 35 at the river, the foundations will be drill shafts. The Employer will perform the precast piling foundation work, but has subcontracted the drill shaft foundation work to another company. Regional Manager Stehling testified that within a few days of the hearing, the Employer planned either to hire a truck driver or to subcontract the job of hauling the spoil created by the drill shaft subcontractor. Stehling also testified that the Employer expected to begin the piling foundation work in mid-June and would add an additional classification of employees, pile drivers, when this work begins. About four or five pile drivers will work on the pile crew.

After the foundations are completed, the Employer will pour the footings, which will encapsulate the piles or drill shafts. The footing crew will consist of about 6 employees.

When the pile driving and footings are completed in about a month or a month and half after the hearing, the column and web walls will be constructed. Web walls will be used on piers 12 through 35, while column walls will be used on piers 2 through 11. Concrete finishers will be added when the work above the footings begins. About seven or eight employees, including carpenters, form setters,⁵ operators and laborers, will perform the column and web wall work.

Next, a column crew of about six employees will extend the column above the web wall. Then, a concrete cap is poured that ties the columns together and provides the bases for the beams that support the road deck. About 12 employees, consisting of carpenters, laborers, and concrete finishers, will perform the cap work.

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The next step is to set the beams. Precast concrete beams are used for the spans leading up to the levee and structural steel spans are used for the longer spans over and adjacent to the levee. For the structural steel work, an ironworker classification will be added.

The next phase of the job will be the deck work. First, diaphragms will be installed transversely between the beams to stiffen the beams for lateral stability. About 10 employees will install the diaphragms. Once the diaphragms are in, the Employer will start forming and placing the deck concrete, which is the riding surface of the bridge. About 18 employees will do the deck work. No new classifications will be added for the diaphragms, but a special finishing operator will be hired for the concrete finishing on the deck. The Employer expects to start the deck work in December 2006 or January 2007.

From December 2006 or January 2007 through about March 2008, the Employer expects to employ approximately 60 to 70 employees, with an even larger employee complement during peak construction times. This complement will consist of 4 to 5 pile crew employees, 6 footing crew employees, 7 to 8 column/web wall employees, 6 column extension crew employees, 12 cap crew employees, 10 employees including concrete finishers to install the diaphragms, and 18 employees to pour the concrete deck.

The Employer plans to use about 7 or 8 subcontractors on the project. In addition to the drill shaft work mentioned above, it plans to subcontract clearing and embankment work, underground and miscellaneous work, tying the reinforcing steel,

⁵ The form setters will assemble and disassemble prefabricated steel forms used for the piers.

some traffic signs and barricade work, some asphalt work, and some other work on the west end associated with the road.

As previously stated, the Employer asserts the petition is premature, and should be dismissed, whereas the Petitioner takes the position that the Employer's projections for its work force are speculative and not supported by the record.

II. ANALYSIS

It is well settled that the Board will direct an immediate election, notwithstanding an employer's plan to expand its workforce, when the employer's current complement of employees is "substantial and representative" of the workforce to be employed in the near future. *Yellowstone International Mailing, Inc.*, 332 NLRB 386 (2000). In determining whether an employee complement is "substantial and representative" the Board has used a case-by-case approach, rather than applying any hard and fast rules. *Toto Industries, Inc.*, 323 NLRB 645 (1997). In general, however, the Board finds an existing complement of employees to be "substantial and representative" when approximately 30 percent of the eventual complement is employed in 50 percent of the job classifications. *Yellowstone International Mailing*, *supra*, relying on *Custom Deliveries*, 315 NLRB 1018, 1019, fn. 8 (1994).

The factors the Board has examined to make the determination of whether the Employer employs a "substantial and representative" complement are: (1) the size of the present work force at the time of the representation hearing; (2) the size of the employee complement who are eligible to vote; (3) the size of the expected ultimate employee complement; (4) the time expected to elapse before a full work force is present; (5) the rate of expansion, including the timing and size of projected interim

hiring increases prior to reaching a full complement; (6) the certainty of the expansion; (7) the number of job classifications requiring different skills which are currently filled; (8) the number of job classifications requiring different skills which are expected to be filled when the ultimate employee complement is reached; and (9) the nature of the industry. *Toto Industries, Inc.*, supra.

In *Clement-Blythe Co.*, 182 NLRB 502 (1970) enfd. 77 LRRM 2373 (4th Cir. 1971), the Board determined that the employer, a construction contractor, employed a substantial and representative complement when it had 43 employees at the time of the scheduled election, would be expanding to approximately 140 employees over the next six months (slightly more than 30 percent of its full complement), and had filled over 50 percent of its job classifications. Similarly, in *NLRB v. Asbury Graphite Mills*, 832 F. 2d 40, 42-43 (3rd Cir. 1987), an immediate election was found appropriate where the employer employed one-third of the expected full complement at the time of the election and did not expect to reach a full complement for another nine months, and the work performed by the existing employees was representative of future operations.

In instances where the current work force was less than 30 percent of the projected complement, the Board has determined there was not a substantial and representative employee complement and has dismissed the petitions. For example, in *K-P Hydraulics Co.*, 219 NLRB 138 (1975), the Board upheld the dismissal of a petition because the employee complement was only 28 percent of the employer's full complement, and fewer than 50 percent of the job classifications were filled. In *Some Industries, Inc.*, 204 NLRB 1142 (1973), the petition was dismissed because at the time of the hearing, the Employer had hired only 17 percent of its projected work force and

filled less than 50 percent of the job classifications. Similarly, in *Bryant Electric Co., Inc.*, 216 NLRB 933 (1975), the Board found there was not a substantial complement of employees when only 4 of a projected 15 to 20 employees had been hired at the time of the representation hearing. Even where the employer did not intend to add more job classifications, but intended to substantially increase the employee complement within four to five months of the hearing, the Board has found a representation petition was appropriately dismissed. *St. John of God Hospital*, 260 NLRB 905, 906 (1982) (at the time of the hearing, the hospital employed 4 registered nurses, 7 licensed practical nurses, and 2 respiratory therapists, but expected to hire 17 to 20 registered nurses and 6 licensed practical nurses).

Applying the Board's "substantial and representative" test here, I conclude that the Employer's present complement of employees does not represent a substantial and representative complement of the total anticipated work force. The size of the work force at the time of the hearing was 14 employees. The Employer expects that approximately six months after the hearing its total work force will be approximately 60 to 70 employees and it expects to maintain that level of employment or greater for approximately 15 to 16 months. Thus, the current work force is less than 30 percent of the total projected work force.

As it expands its work force, the Employer will continue to have job classifications for carpenters, laborers, welders and machine operators but will need to add employees in the following classifications: concrete finish machine operator, ironworker, concrete finisher, pile driver, and possibly a truck driver.

No evidence was offered to contradict the Employer's testimony at hearing that it will continue to hire significantly more employees as it begins the actual construction work. Its current work force is not performing the same type of work as some of the projected new employees would perform, such as driving concrete pilings, setting concrete footings, building walls, installing diaphragms between beams, casting concrete, and forming, grading, and pouring the concrete deck.

Accordingly, I find the Employer's workforce is not a substantial and representative complement of the Employer's expected total workforce and I will dismiss the petition as untimely.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. The Petitioner is a labor organization within the meaning of the Act.
5. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act because the petition is premature and therefore untimely.

ORDER DISMISSING PETITION

I hereby order that the petition filed in this case is dismissed.

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RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **June 29, 2006**.

The request may not be filed by facsimile.

DATED at Memphis, Tennessee, this 15th day of June 2006.

/s/[Ronald K. Hooks]

Ronald K. Hooks, Regional Director
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